No. 91-1059

IN THE

Supreme Court of the United States

October Term, 1991

VIACOM INTERNATIONAL INC.,

Petitioner,

vs.

CARL C. ICAHN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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Dated: January 27, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Even assuming, *arguendo*, that a corporation can state a cause of action under the Hobbs Act and RICO against a holder of 16.95 percent of the corporation's stock for "extorting" $79.50 per share from the corporation in return for the stock, did the Court of Appeals err in affirming a grant of summary judgment dismissing this action on the ground that the corporation had failed to establish damages, where (i) at the time of the alleged extortion the corporation's Board of Directors and investment bankers valued the corporation's stock at $88 to $100 per share, (ii) less than four months later the corporation's management offered to purchase all of the corporation's stock for $81 per share, (iii) less than ten months later the corporation's current owner acquired all of the corporation's outstanding stock for $111 per share, and (iv) if anything, the asset values underlying the corporation decreased during the ten month period at issue?

2. Did the district court err (the Court of Appeals declined to reach this point) in concluding that a 16.95 percent shareholder's sale of a corporation's stock back to the corporation, pursuant to a 60 page single-spaced agreement negotiated on behalf of the corporation by distinguished counsel in order to avoid a contest for corporate control, did not constitute Hobbs Act extortion and therefore did not state a RICO claim?

RULE 29.1 STATEMENT

The only parent company or subsidiary (excluding wholly owned subsidiaries) of any of the corporations named as defendants in this litigation (and as respondents in the pending petition for a writ of certiorari) is the Carl C. Icahn Foundation, a not-for-profit corporation. Trans World Airlines, Inc. is an affiliate of a subsidiary of defendant (and respondent) ACF Industries Inc.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York granting defendants' (and now respondents') motion for judgment on the pleadings or summary judgment pursuant to Federal Rules of Civil Procedure 12(c) and 56(b) is reported at 747 F. Supp. 205 (S.D.N.Y. 1990). The majority and concurring opinions of the United States Court of Appeals for the Second Circuit affirming the District Court's dismissal of the action are reported at 946 F.2d 998 (2d Cir. 1991) (A1-12).[1]

1. References to "A___" refer to petitioner's Appendix filed in this Court. References to "JA___" refer to the four volume Joint Appendix filed in the Court of Appeals.

STATEMENT OF THE CASE

A. Proceedings In The District Court And The Court Of Appeals

This case arises out of a May 22, 1986 repurchase by plaintiff and petitioner Viacom International Inc. ("Viacom") of 3,498,200 shares (approximately 16.95 percent) of Viacom's common stock from defendant and respondent Carl C. Icahn and a group of entities affiliated with Mr. Icahn for an alleged price of $79.50 per share, at a time when Viacom's common stock was trading on the New York Stock Exchange at approximately $62 per share, in order to avoid a contest for corporate control. Viacom contends that this repurchase somehow constituted "greenmail" extortion indictable under the Hobbs Act, 18 U.S.C. § 1951, punishable by up to 20 years in prison. Viacom also alleges that defendants engaged in a pattern of such "greenmail" extortion between 1979 and 1986, and are therefore liable for damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*

The case was commenced as a shareholder derivative action on May 28, 1986. Defendants moved to dismiss the action, contending that the "greenmail" extortion claim failed to state a cause of action upon which relief could be granted. The case was initially assigned to District Court Judge Robert J. Ward, who—in Judge Ward's words—"set the stage" for a February 4, 1987 oral argument on the motion by noting his pre-argument views (A36, JA152). Contrary to Viacom's characterization of the transcript of this oral argument as an "opinion of the District Court . . . delivered orally" (Pet. at 2), Judge Ward's pre-argument views were in fact never incorporated into a written or oral opinion. To the contrary, Judge Ward expressed surprise during the course of argument that a long line of cases had upheld stock repurchases by corporations from large shareholders at prices above market price, and requested supplementary briefing on this point (A51-53, 71, JA173-76, 203).

Before Judge Ward could decide the motion to dismiss, Viacom was sold to its current owner, National Amusements, Inc., for $111 per share—$31.50 more per share than the $79.50 price defendants allegedly extorted less than ten months earlier. National Amusements then substituted

Viacom as plaintiff in this action (JA204-06). Judge Ward advised the parties that before deciding defendants' motion to dismiss and devoting the time and resources necessary to litigate Viacom's novel "greenmail" extortion claim, he thought it prudent to examine–possibly in a short damages trial–the straight-forward issue created by National Amusement's acquisition of Viacom: How was Viacom injured by paying an alleged $79.50 per share to defendants for Viacom shares at a time when Viacom's Board of Directors and investment advisors had valued the company at $88 to $100 per share, and less than 10 months before the company was sold for $111 per share?

Discovery on the damages issue followed, and on September 26, 1988 defendants advised Judge Ward that they would be ready shortly for the damages trial Judge Ward had proposed (JA1427-29). Aware of the likelihood of a case-ending defeat, Viacom vehemently objected to such a trial (JA1430-31). This issue was discussed at a September 28, 1988 pre-trial conference, during which, in the absence of a court reporter, Judge Ward denied defendants' two year old motion to dismiss without an opinion. Judge Ward made clear that his denial of the motion to dismiss was premised in large part upon his belief that the entire case could be resolved with six weeks of limited discovery and a November 1988 trial. Judge Ward highlighted his concern that this case might constitute an abuse of RICO, and asked Viacom to file an Amended Complaint deleting its request for treble damages (Viacom's counsel readily agreed to do so, and quickly did). Judge Ward also warned Viacom that sanctions might result if this action were pursued to a conclusion and lost.

The November 1988 trial date was postponed at Viacom's request, and on December 20, 1988 the case was transferred to District Court Judge Robert P. Patterson. Discovery continued for another year, until, in December 1989, the United States Court of Appeals for the Second Circuit affirmed a dismissal of a state law "greenmail" duress claim premised upon facts virtually identical to those alleged in this federal law "greenmail" extortion case. *See Kamerman v. Steinberg*, 891 F.2d 424 (2d Cir. 1989). Defendants promptly filed a motion for judgment on the pleadings or summary judgment (JA296-97). Judge Patterson

granted defendants' motion in an Opinion and Order dated September 14, 1990, on the ground that "defendants did not obtain property from plaintiff to which they had no lawful claim and therefore did not commit extortion." *Viacom Int'l Inc. v. Icahn*, 747 F. Supp. 205, 213-14 (S.D.N.Y. 1990), *aff'd*, 946 F.2d 998 (2d Cir. 1991). In light of this case-dispositive ruling, Judge Patterson concluded that "[d]efendants' argument that plaintiff has suffered no damages need not been reached." *Id.* at 214.

The United States Court of Appeals for the Second Circuit, in an opinion written by Senior Circuit Judge Joseph T. Sneed (of the United States Court of Appeals for the Ninth Circuit, sitting by designation), and joined by Circuit Judge Amalya L. Kearse, affirmed the district court's dismissal of the case "[w]ithout addressing whether Icahn may have violated the Hobbs Act," because "we conclude that Viacom was not damaged by the transaction." *Viacom Int'l Inc. v. Icahn*, 946 F.2d 998, 1000 (2d Cir. 1991) (A6). The Second Circuit noted that the district court had "implicitly recognized that Viacom was not injured when it concluded that Icahn obtained his deal through 'hard bargaining' and did not receive a benefit to which he was not otherwise entitled by law," *id.* at 1002 (A10), and that by affirming the judgment of the district court due to the absence of damages "we are selecting what to us is the most direct route" to the conclusion arrived at by the district court. *Id.* at 1000 (A7).

A concurring opinion by Circuit Judge Daniel J. Mahoney agreed that "the judgment of the district court should be affirmed" because "I am in essential agreement with the district court's analysis that Viacom's allegations of Hobbs Act violations are inadequate to state a claim." *Id.* at 1002-03 (Mahoney, J., concurring) (A11, 12). Judge Mahoney added that while he disagreed with the majority's determination that Viacom had failed to establish damages as a matter of law, "[i]t may well be, as the majority concludes, that the real value of the stock on [May 22, 1986] exceeded $79.50 per share, and that the evidence marshalled by the majority in support of that conclusion should be regarded as persuasive." *Id.* at 1002 (A11).

B. Statement Of Facts

1. The May 1986 Repurchase Transaction

On May 15, 1986, Mr. Icahn and the other defendants named in this action filed a Schedule 13D with the Securities and Exchange Commission (the "SEC") stating that they had acquired 3,498,200 shares (or approximately 16.95 percent) of Viacom's common stock. Defendants' Schedule 13D filing disclosed that defendants had informed Viacom that defendants were prepared to pay $75 per share ($10 more per share than the $65 price at which the stock was then trading) in cash for all of Viacom's outstanding common stock (JA407). It is undisputed that Terrence A. Elkes, Viacom's then-Chairman and Chief Executive Officer, met with Mr. Icahn and subsequently advised Viacom's Board of Directors that "there was a possibility that Mr. Icahn would make an offer to the Board to purchase the Company at a price somewhere near $80 a share" (JA844).

It is also undisputed that the $75 offer disclosed in defendants' Schedule 13D filing was conditioned upon redemption by Viacom's Board of a "poison pill" rights plan (JA407) the Board had adopted four months earlier without shareholder approval (JA318-19). The devastating impact of these poison pill rights ensured Viacom's Board the power to bar any acquisition attempt by virtue of its power to approve or not approve a bidder's offer. *See generally In re Desoto, Inc. Shareholder Litig.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,964, at 95,396 (Del. Ch. Feb. 5, 1990) (defining the effect of a poison pill as "to make the target's stock prohibitively expensive to the suitor").

Next, days after learning that defendants had become Viacom shareholders, Viacom's Board determined that it was not content with the protection assured it by its potent poison pill, and granted itself a second drastic weapon against any offer to acquire Viacom not blessed in advance by Viacom's Board. Specifically, on May 14, 1986, Viacom filed a Form S-3 registration statement with the SEC in order to permit Viacom's issuance of (1) up to 7.5 million units, each consisting of one share of Viacom common stock and one warrant to acquire Viacom common stock at an unspecified exercise price, and (2) up to $250 million of subordinated "poison put" notes containing restrictive covenants in large

measure precluding any assumption of additional debt or transfer of assets by Viacom (JA321, 346, 349, 352-53). Viacom's S-3 filing disclosed that the unspecified exercise price for the proposed stock-warrant units would be reduced by 25 percent in the event any person became the owner of 20 percent of Viacom's outstanding common stock without prior approval by Viacom's Board. Viacom's S-3 filing also disclosed that the holders of the proposed poison put notes would have the right to redeem the notes for a cash price equal to 120 percent of face value in the event that any person acquired more than 50 percent of Viacom's stock without prior approval by Viacom's Board (JA347, 348, 353).

Finally, Viacom's S-3 filing stated that the proceeds of this offering might be used to finance a discriminatory tender offer "to purchase shares of Common Stock beneficially owned by shareholders other than the Icahn Group by means of a transaction that excludes the Icahn Group from participation" (JA329). This powerful defensive weapon, pursuant to which Viacom would utilize corporate assets to fund a discriminatory stock repurchase program benefiting all shareholders except defendants, was specifically barred by the SEC two months later. *See* 17 C.F.R. §§ 240.13e-4(f) & 240.14d-10; Securities Act Release No. 33-6653 and Exchange Act Release No. 34-23421, 51 Fed. Reg. 25873 (July 11, 1986).

Viacom's intent to pursue a "scorched earth" defense was clear. Viacom would dilute Mr. Icahn's stock position by more than 50 percent by issuing 7.5 million shares of common stock and warrants to acquire an additional 7.5 million shares of common stock, all at a substantial discount from market value. Viacom would also issue a quarter of a billion dollars in debt instruments including onerous restrictive covenants and poison put provisions assuring large dividends to noteholders should a change in control occur. All of this, of course, was designed to make the corporation as unattractive to Mr. Icahn as possible. Then, should Mr. Icahn still refuse to "voluntarily" withdraw from the fray, Viacom would utilize corporate assets to fund a discriminatory stock repurchase program which would enable the corporation to purchase shares at premium prices from all shareholders other than Mr. Icahn.

Simultaneously with its threat to implement these lethal

defensive measures, Viacom's Form S-3 explicitly "reserve[d] the right to purchase any or all of its Common Stock" in lieu of taking these actions (JA329). The implication was obvious–Mr. Icahn could assume control of a debt-ridden company bearing little resemblance to the corporation he and Viacom's other shareholders had invested in, or Mr. Icahn could sell his shares back to Viacom.

The parties entered into negotiations on the terms of such a transaction, and these negotiations culminated in Viacom's repurchase on May 22, 1986 of the 3,498,200 Viacom shares held by defendants. Viacom alleges that it paid defendants consideration equal to approximately $79.50 per share: (1) $62 per share, the then-market price of Viacom's stock, in cash, (2) $15.72 per share in warrants to purchase Viacom stock, and (3) $1.21 to $2.43 per share in commercial air time (JA39-40).[2] The parties' agreement is embodied in a 60 page single-spaced document (JA706-64) which was negotiated by Viacom with the help of mergers and acquisitions specialists at the Skadden Arps Slate Meagher & Flom law firm, which advised Viacom that it "was free to accept or reject the proposal" (JA849, 858-59).

2. Viacom's Value In May 1986

The undisputed facts demonstrate that Viacom's stock was worth far more in May 1986 than the $79.50 per share Viacom alleges that defendants "extorted" for the stock, and thus illustrate both the frivolous nature of Viacom's extortion claim and the absence of any damages in this case.

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2. While defendants did not rely upon this fact for purposes of their motion for judgment on the pleadings or summary judgment, this Court should be aware that the true value of the cash, warrant and air time package was substantially lower than that pleaded by Viacom. Indeed, the contemporaneous valuation of the warrants by Viacom attributed approximately $7 per share *less* to the warrants defendants received than Viacom alleges in this action (JA860, 571, 577, 612-13, 621).

a. The May 1986 First Boston And DLJ Valuations And Viacom's May 1986 Board Deliberations

In connection with Viacom's consideration of the May 1986 repurchase transaction, Viacom's Board of Directors asked for and received reports based upon confidential corporate information from both The First Boston Corporation ("First Boston") and Donaldson, Lufkin & Jenrette, Inc. ("DLJ"). First Boston valued Viacom's common stock at $90 to $100 per share, and DLJ valued Viacom's stock at $88 to $100 per share (JA853-55). Viacom's Board was specifically advised by counsel that any repurchase of stock held by defendants must be at a price "in reasonable relation to the intrinsic value of the stock" (JA868).

Viacom's Board also specifically addressed the $75 per share proposal that defendants had publicly stated they were prepared to make for any and all shares of Viacom's stock, and concluded that $75 per share was an "inadequate and inappropriate" price (JA856, 874). The deposition testimony by Viacom's directors and investment advisors on the intrinsic—as opposed to the market—value of Viacom's stock was uniform. For example:

- Leo Cherne (Viacom Director): "[W]e turned to First Boston and we turned to Donaldson Lufkin & Jenrette for their evaluation of would a $75 offer be adequate if made, and I do recall that their judgment was that *no price short of somewhere between 80, 85, $90 would represent fair value for Viacom*" (JA560-61; emphasis added).
- John F. White (Viacom Director): "[A] sale at $75 was not the true value of that company. We had two sets of financial advisers. *The [First] Boston Company and Donaldson Lufkin Jenrette each independently gave us full-blown studies. One said the company was worth 90 to $100 a share; the other, which was figured on a slightly different basis, said it was between 88 and 100*, as I recall it. But both of them said that the 75 was totally inadequate. And it was on that basis that the directors of the company said no way" (JA620; emphasis added).

- Frederick Smith (First Boston): "*[Y]ou would have to get above 80 for you to begin to get into the range of fairness*" (JA600-01; emphasis added).

In short, as Mr. Cherne testified, the stock's market price was viewed by Viacom in May 1986 as one of "the least reliable indicators" of value (JA561-62).

b. The September 1986 To March 1987 Contest For Control Of Viacom

On September 16, 1986–less than four months after Viacom repurchased defendants' shares for an alleged $79.50 per share–a management-led leveraged buyout group commenced a battle for control of Viacom with an announcement of an offer to purchase the company.[3] It is undisputed that this leveraged buyout group offered Viacom's shareholders a package of cash and securities having a claimed aggregate value of $81 per share–a mere dollar or two more than the all cash "price somewhere near $80 a share" that Viacom's Chairman and Chief Executive Officer, who headed the leveraged buyout group, had advised Viacom's Board that Mr. Icahn might have offered for the company four months earlier (JA844). On February 2, 1987, National Amusements made a bid to acquire Viacom for cash and securities having an aggregate value of approximately $94 per share. On March 3, 1987, following a series of bids and counter-bids, Viacom's Board agreed to a transaction pursuant to which National Amusements acquired Viacom, with Viacom's shareholders cash and securities valued at a total of $111 per share (JA490).

Not surprisingly, the market price of Viacom's stock skyrocketed during this period, from $80.75 on September 16, 1986 to $87.75 on February 2, 1987 and to $104 on March 3, 1987 (JA473).

3. Viacom declared a stock split after consummation of the May 1986 repurchase transaction. For ease of reference, all prices in this brief are expressed in pre-split terms.

c. The Lack Of Any "Non-Contest For Control Related" Increases In The Value Of Viacom Between May 1986 And March 1987

In responses to interrogatories in this litigation, Viacom was unable to identify any "reason or reasons (including, but not limited to, material changes in the value of Viacom's business, assets and operations)" for the increased market value of Viacom's stock between May 1986 and March 1987 other than "the knowledge, subsequent to September 16, 1986, that the entire company would in fact be sold" (JA487-90).

This is hardly surprising in light of the testimony by Frederick Smith of First Boston that the summer and fall of 1986 saw material and accelerating adverse changes in asset values in the cable industry due to "a lot" of "specific negative factors," including the fact that the "independent network marketplace [was] to some extent in a shambles" (JA602-10, 611, 614-15). Viacom's then-Chairman and Chief Executive Officer similarly testified that industry changes during this time period had a material adverse effect upon the value of companies in the cable industry (JA567-70).

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT'S DECISION DISMISSING PETITIONER'S CLAIM DUE TO THE ABSENCE OF DAMAGES DOES NOT WARRANT REVIEW BY THIS COURT

Review by this Court of the Second Circuit's decision dismissing Viacom's Hobbs Act claim due to the absence of damages is unwarranted because the Second Circuit's decision is based upon a *sui generis* fact pattern and is correct, and because the decision does not conflict with any prior holding of this or any other Court.

A. The Second Circuit's Decision Is Based Upon A Sui Generis Fact Pattern, And Is Correct

As set forth in the Statement of Facts above, this case involves a unique, *sui generis* set of facts. Viacom paid defendants an alleged $79.50 per share in May 1986 for stock:

- which Viacom's own investment bankers (First Boston and DLJ) valued in May 1986 at $88 to $100,
- which Viacom's Board of Directors believed in May 1986 was worth $88 to $100,
- which Viacom's former management offered to buy at $81 per share less than four months later,
- which Viacom's Board agreed to sell to Viacom's current owner at $111 per share less than ten months later, and
- which traded at market prices of up to $104 during the May 1986 to March 1987 time period.

See Statement of Facts, *supra* at 7-10.

Recognizing the very real "benefit of the bargain" Viacom attained when it repurchased stock worth over $100 per share for an alleged $79.50 per share, Viacom stays far away from the restitution or avoidance "cancellation of the bargain" measure of damages usually relied upon in cases where duress—"the essence of extortion"[4]—is alleged. *See, e.g.*, D. Dobbs, *Remedies* § 10.2, at 658-59 (1973) ("The plaintiff sues to recover something he has been coerced into giving to the defendant, that is, to avoid a contract. . . . The defendant is not liable for damages."); *Restatement (Second) of Contracts* § 175 (1981) (contract induced by duress is

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4. The Hobbs Act derived its definition of extortion from New York's extortion statute (*see United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973)), and under New York law duress is "the essence of extortion." *People v. Dioguardi*, 8 N.Y.2d 260, 273, 168 N.E.2d 683, 692, 203 N.Y.S.2d 870, 882 (1960). Federal courts have described extortion as a "Cause[] of Action of Which Duress is an Element," *Cullen v. Margiotta*, 811 F.2d 698, 722 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987), and repeatedly use the words "coercion" and "extortion" on virtually an interchangeable basis. *See, e.g., United States v. Salerno*, 868 F.2d 524, 530 (2d Cir.), *cert. denied*, 491 U.S. 907 and 493 U.S. 811 (1989); *United States v. Capo*, 817 F.2d 947, 954 (2d Cir. 1987) (*in banc*); *Margiotta*, 811 F.2d at 722; *Printers II, Inc. v. Professionals Publishing, Inc.*, 784 F.2d 141, 147-48 (2d Cir. 1986); *United States v. Cerilli*, 603 F.2d 415, 433 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

voidable). Instead, Viacom's entire damage claim rests upon the so-called "efficient capital market hypothesis."

This hypothesis is an economic theory providing—in Viacom's words—that "because of the large number of skilled profit-motivated investors continuously analyzing all publicly available information concerning liquid publicly traded securities, the prices of those securities in the market fairly reflects the value of the securities," and that the market price of the stock of a widely followed and actively traded corporation's stock is "the most reliable indicator of the value of [the] shares" (946 F.2d at 1000 (A7) (quoting JA495-96)). Viacom's reliance upon this economic theory, of course, is directly contradictory to Viacom's conduct at the time of the May 1986 repurchase agreement. *See* Statement of Facts, *supra* at 8-9, including Mr. Cherne's testimony that in May 1986 Viacom regarded its stock price as one of "the least reliable indicators" of the stock's value (JA561-62).

Like most economic theories, the efficient market hypothesis is not without its critics. *See, e.g.*, Gordon & Kornhauser, *Efficient Markets, Costly Information and Securities Research*, 60 N.Y.U. L. Rev. 761, 764-65 (1985) ("[t]he more recent economic research and controversy about the hypothesis casts doubt on [the theory's] empirical claims and theoretical underpinnings"); Rohrer, *Ferment in Academia*, Institutional Investor, July 1985, at 69 ("[t]he efficient-market hypothesis is coming under attack as never before"); Shiller, *Stock Prices and Social Dynamics*, *printed in Brookings Papers on Economic Activity* 457, 459 (1984) ("the efficient market hypothesis represents one of the most remarkable errors in the history of economic thought").[5]

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5. *See also, e.g.*, *Maybe the Market Isn't So 'Efficient' After All*, Bus. Wk., Oct. 30, 1989, at 10; Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 Mich. L. Rev. 613 (1988); Donnely, *Efficient-Market Theorists Are Puzzled by Recent Gyrations in Stock Market*, Wall St. J., Oct. 23, 1987, at 7; Grossman & Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ. Rev. 393 (1980); *Symposium on Some Anomalous Evidence Regarding Market Efficiency*, 6 J. Fin. Econ. 95 (1978).

Moreover, even as accepted by its adherents, the efficient capital market hypothesis incorporates an important gap: "Information and insight not communicated to the market may not be reflected in stock prices." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1187 n.8 (Del. 1988) (citing one of the seminal efficient market studies, Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383 (1970) ("[a] market in which prices always 'fully reflect' available information is called 'efficient' ")).[6] In this case, the information not communicated to the market as of May 1986 was vast: the existence of the First Boston and DLJ valuations, Viacom's deliberation and determination regarding the adequacy of a $75 per share offer, the fact that Viacom's management would attempt to purchase the company in just four months with an opening bid of $81 per share, and the fact that within the ensuing five months the company would be purchased at a price of $111 per share.

Not surprisingly, in light of all this, the Second Circuit in this case determined that market price is not "the only factor to be considered when determining the value of stock in a situation such as that before us," and that the efficient market theory is thus not "the sole means of determining value." 946 F.2d at 1000-01 (A7). Put another way, "just as the Constitution does not enshrine Mr. Herbert Spencer's social statistics," neither does the law "elevate the theory of a single, efficient capital market to the dignity of a sacred text." *Paramount Communications, Inc. v. Time Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,277 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1990).

In short, Viacom rejected the efficient market theory when it entered into the May 1986 repurchase agreement underlying this litigation, and cannot now flip-flop 180 degrees

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6. Professor Fama has been described in the *Wall Street Journal* as an "efficient-market champion" who, like other "efficient market champions," recognizes that the efficient market theory is "meant to be a 'model' rather than a perfect explanation of stock prices." *See* Anders, *Some 'Efficient-Market' Scholars Decide It's Possible to Beat the Averages After All*, Wall St. J., Dec. 31, 1985, at 11.

and rely upon this theory to support an inequitable $60 million windfall damage claim. In the Second Circuit's words, Viacom "cannot now complain that it was somehow injured when it paid less for the stock than it thought the stock was worth." 946 F.2d at 1002 (A10).

B. The Second Circuit's Decision Does Not Conflict With Any Prior Holding Of This Or Any Other Court

None of the cases cited by Viacom are inconsistent with the Second Circuit's rejection of Viacom's insistence that it can show injury because, according to Viacom, "stock can only be valued at its price per share in the open market." 946 F.2d at 1002 (A10). This Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)–the only decision of this Court cited by Viacom on this issue (Pet. at 21)–does nothing more than provide plaintiffs in securities fraud cases involving stocks traded on efficient markets with a rebuttable presumption of reliance–the so-called "fraud on the market" theory. *See id.* at 241-49; *see also id.* at 247 n.25 (citing 7 cases). This Court was careful to note in *Basic* that "our decision today is not to be interpreted as addressing the proper measure of damages in litigation of this kind." *Id.* at 248 n.28.

The Seventh Circuit's 15 year old decision in *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977)–the only Court of Appeals decision cited in the text of Viacom's petition on this issue (Pet. at 21-22)–is likewise inapposite. The *Mills* decision states only that the efficient market theory may be utilized in cases where market value is reliable. *Id.* at 1247. The Second Circuit in *Seaboard World Airlines, Inc. v. Tiger Int'l, Inc.*, 600 F.2d 355 (2d Cir. 1979)–cited by Viacom in a footnote (Pet. at 20 n.20)–likewise states nothing more than that the efficient market theory may be utilized when market value is reliable. *Id.* at 361-62. The *Mills* and *Seaboard* decisions do not say anything about not considering indicia of value such as contemporaneous investment advisor opinions, contemporaneous board beliefs, or short-term market developments such as those that occurred in this case as a means of assessing damages at the point in time at which an alleged wrong occurs.

Finally, Viacom's suggestion that a corporation may have one value for purposes of day to day trading and another value for purposes of a "control premium" sale of the corporation as a whole, and Viacom's distinction of the cases relied upon by the Second Circuit on this ground (Pet. at 19-20 & 22-23), misses the point. First, Viacom offered no evidence in the district court (or anywhere else) demonstrating that the May 1986 First Boston and DLJ analyses valuing Viacom at $88-100 per share were dependent upon a sale of Viacom as a whole or at a control premium. Second, it is axiomatic that a corporation can only have one inherent value at any given time. The fact that inherent value may not be fully reflected in the corporation's market value at a given point in time, or that inherent value may be achievable only in the context of a value-maximizing transaction such as a sale of the company, or that such a value-maximizing transaction may include a control premium, does not change inherent value.

Put simply, the efficient capital market hypothesis is an economic theory which some economists accept and some economists reject, and which courts have relied upon as a rebuttable presumption under certain circumstances and rejected under other circumstances. Viacom has cited—and defendants are aware of—no judicial decision which has ever awarded damages solely on the basis of the efficient capital market hypothesis, where readily available evidence demonstrated that market value was an unreliable measure of inherent value. To the contrary, as the Second Circuit in this case correctly recognized, numerous courts considering the value of securities have consistently rejected market price and the efficient market hypothesis as an appropriate means of valuation in and of themselves, without regard to other relevant factors and circumstances. *See* 946 F.2d at 1000-01 (A7-8) (citing cases).

II. THE HOBBS ACT ISSUES RAISED BY PETITIONER DO NOT WARRANT REVIEW BY THIS COURT

Review by this Court of the Hobbs Act issues considered by the district court which the Second Circuit found unnecessary to review is unwarranted. The Second Circuit correctly declined to address these issues due to the absence

of any damages in this litigation, and, even if that were not the case, the district court's decision rejecting Viacom's Hobbs Act claim is correct and does not conflict with any prior holding of this or any other Court.

A. The Second Circuit Correctly Concluded That Hobbs Act Issues Are Entirely Academic In This Case Due To The Absence Of Damages

Having determined that Viacom "cannot now complain that it was somehow injured when it paid less for the stock than it thought it was worth" (946 F.2d at 1002 (A10)), the Second Circuit quite properly determined not to address the merits of Viacom's Hobbs Act claim. This Court, too, should decline to decide Viacom's Hobbs Act claim.

Recognizing this, Viacom engages in hyperbole asserting that the Second Circuit's decision in this case somehow stands for broad legal propositions involving issues far beyond those litigated in this case, and which will somehow have enormous implications to litigants in other cases. Viacom, for example, asserts that the Second Circuit's decision exempts "all coercive transactions in securities from the [Hobbs] Act's prohibitions, failing to heed the statute's plain language and this Court's teaching, at a time when sophisticated financial crimes have been on the increase" (Pet. at 11). Viacom similarly asserts that the Second Circuit's use of *United States v. Enmons*, 410 U.S. 396 (1973), "as a basis for exempting from the Act a broad category of ordinary criminality affecting interstate commerce makes this case eminently worthy of certiorari" (Pet. at 12).

Far from deciding any of this, of course, the Second Circuit simply declined to address Hobbs Act issues due to the absence of damages in this case, since Viacom paid less for the Viacom securities it repurchased from defendants than the securities were worth. Nowhere does the Second Circuit's decision "exempt[] all coercive transactions in securities" from the Hobbs Act or mention *Enmons*, much less use *Enmons* "as a basis for exempting from the [Hobbs] Act a broad category of ordinary criminality." Viacom's request that this Court review issues not decided by the Second Circuit should therefore be rejected on the same ground—the absence of damages—that the Second Circuit declined to review these issues.

B. The District Court's Decision Rejecting Petitioner's Hobbs Act Claim Is Correct, And Does Not Conflict With Any Prior Holding Of This Or Any Other Court

Unlike the Second Circuit, the district court did consider the merits of Viacom's Hobbs Act claim, and held that under *Enmons* and its progeny the law does "not entitle Viacom to a right to pursue its business interests free of the problems and fears caused by the threat of a takeover," and indeed that "[p]ublic corporations are subject to such threats on a regular basis." 747 F. Supp. at 213. The district court therefore concluded that defendants had "a lawful claim" to the consideration they received in return for 16.95 percent of Viacom's stock, and that "any intentional exploitation of fear by defendants was only part of 'hard bargaining' in a deal which resulted in plaintiff receiving a benefit to which it was not otherwise entitled by law. Accordingly, defendants did not obtain property from plaintiff to which they had no lawful claim and therefore did not commit extortion." *Id.* at 213-14.

Viacom contends that the district court's decision should be reviewed because the district court relied upon this Court's decision in *Enmons*, which was—according to Viacom—a "5 to 4 decision" which is "controversial" and "some would say wrongly-decided" (Pet. at 12). Viacom, however, never explains how this controversy has manifested itself in any Court of Appeals (much less district court) decisions. Instead, Viacom imagines violations by defendants of Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d), which were neither pleaded nor argued in the district court in this case (Pet. at 6, 10-11). Viacom also relies upon supposed "ex parte communications by Icahn to the District Court" and "between counsel for Icahn and Judge Patterson" (Pet. at 4 nn. 6-7). These supposed "ex parte communications" in fact constitute nothing more than a written *in camera* application for a protective order, which is part of the record in this case which this Court is free to

review.[7]

Nothing in the district court's decision dismissing this action is inconsistent with Hobbs Act jurisprudence. It is undisputed that the Justice Department has never indicted anyone for "greenmail" extortion, despite the numerous "greenmail" stock repurchases at premiums over market value which were well-reported in the business, legal and popular press before and during the 1980s.[8] As this Court noted in *Enmons*, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." 410 U.S. at 410.

It is equally undisputed that the SEC and members of Congress have unsuccessfully proposed civil—not criminal—legislation designed to regulate—but not prohibit—"greenmail" payments.[9] As the Fifth Circuit has noted, "[t]he fact that the SEC has proposed these reforms provides implicit support for the conclusion that it does not believe that current federal law provides a remedy for greenmail." *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1453 n.8 (5th Cir. 1986). The same conclusion can obviously be reached with respect to Congress.

Enmons also offers two practical reasons why the dis-

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7. This Court has "approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection, . . . and the practice is well established in the federal courts." *United States v. Zolin*, 491 U.S. 554, 569 (1989) (citing, *e.g.*, *Kerr v. United States District Court*, 426 U.S. 394, 404-05 (1976)).

8. *See, e.g.*, *Wall Street Bemoans a New 'Greenmail' Season*, N.Y. Times, Dec. 28, 1986, at E4; *A Flurry of Greenmail Has Stockholders Cursing*, Bus. Wk., Dec. 8, 1986, at 32; Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 Yale L.J. 13, 13-14 (1985) (noting that $4 billion was paid in "greenmail" by corporations between April 1983 and April 1984).

9. *See, e.g.*, S. 1244, 101st Cong., 1st Sess. § 4 (1989); S. 78, 100th Cong., 1st Sess. § 1 (1987); S. 227, 100th Cong., 1st Sess. § 4(a)(7) (1987); S. 1907, 99th Cong., 1st Sess. § (4)(g) (1985); H.R. 5693, 98th Cong., 2d Sess. § 204(a)(5) (1984) (JA647-67).

trict court correctly declined to expand the Hobbs Act beyond the limits recognized by the Justice Department, the SEC and the Congress. First, the *Enmons* court emphasized, "being a criminal statute, [the Hobbs Act] must be strictly construed, and any ambiguity must be resolved in favor of lenity." 410 U.S. at 411; *see also, e.g., Hughey v. United States*, 110 S. Ct. 1979, 1985 (1990) ("longstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant").

Second, the *Enmons* court also emphasized, courts should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." 410 U.S. at 411-12 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). This concern is doubly appropriate here, where Viacom seeks to extend the Hobbs Act into the realm of both state criminal law and state corporate law. No state has criminalized "greenmail" repurchases, and claims that such transactions violate state corporate law have been rejected by court after court after court. *See, e.g., Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988) (citing 6 cases).[10]

Finally, Viacom can point to no Court of Appeals (or even district court) decision upholding a "greenmail" extortion claim. To the contrary, the only court other than the district court in this case that has ever considered such a claim–*Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983), a case Viacom does not even mention in its petition –reached the same result that was reached in this case. Faced with allegations of extortion virtually identical to those alleged here–and indeed which are alleged as one of the predicate acts supporting Viacom's RICO claim in this case

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10. The only cases which have questioned the propriety of "greenmail" transactions as a matter of corporate law have done so on the basis of allegations that corporate directors have breached their fiduciary duty to shareholders, and that the selling shareholder had aided and abetted that breach of fiduciary duty. *See Feinberg v. Carter*, 652 F. Supp. 1066, 1083-84 (S.D.N.Y. 1987); *Heckmann v. Ahmanson*, 168 Cal. App. 3d 119, 127, 214 Cal. Rptr. 177, 182-83 (1985). Neither the breach of fiduciary duty nor the aiding and abetting of such a breach constitutes a predicate act under RICO.

(JA32)—the *Dan River* court concluded that "we fail to appreciate the supposed similarity" between "Icahn's [alleged 'buy-me-out-or-face-a-takeover'] ultimatum" and "an extortion threat":

> We do not accept that Icahn's candid recognition and expression of the facts of life in corporate capitalism—namely, that management, in its own interests or in the interests of its shareholders, might be tempted to prevent a takeover by either buying out the bidder or securing a 'white knight' to do so—is illegal.

Id. at 285, 291. Rather, the Fourth Circuit observed, Mr. Icahn simply put management to the same "difficult choice —accede to a takeover or employ defensive moves—[as] does any party who, altogether lawfully, contemplates a takeover attempt." *Id*. at 285.

In short—and separate apart from the purely academic nature of the Hobbs Act issue in this litigation due to the absence of damages—there is nothing about the district court's decision dismissing Viacom's "greenmail" extortion claim that makes this case worthy of certiorari. The district court certainly did not err in finding that sophisticated business people who retain distinguished counsel to negotiate a 60 page single-spaced agreement pursuant to which stock is repurchased at a price lower than that at which the purchaser values the stock, and which the parties then openly announce to the world, are not Hobbs Act "extortion" victims.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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